71-1168

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. .....

STRECKFUS STEAMERS, INC.,
Plaintiff-Petitioner,

CAPT. WM. F. CARROLL, CAPT. CORNELIUS RIEMER, CAPT. HARRY GRIESHABER, THOMAS P. CHAPMAN, THOMAS McKIBBEN, MARVIN CHAPMAN, ARTHUR JACKSON, GEORGE V. JOHNSON, MRS. BETTY SCHWALLER, MRS. LILY COLD, MRS. LUCY FOSTER, WILLIE COLEMAN, JOHN CARROLL, SPENCER T. JONES,
Defendants-Petitioners,

vs.

CITY OF ST. LOUIS and JOHN K. TRAVERS, Collector of the City of St. Louis,
Defendant-Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of Missouri

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To the Supreme Court of Missouri

The Petitioners, Streckfus Steamers, Inc., plaintiff in a suit for declaratory judgment, and Captain William F. Carroll, Captain Cornelius Riemer, Captain Harry Grieshaber, Thomas P. Chapman, Thomas McKibben, Marvin Chapman, Arthur Jackson, George V. Johnson, Mrs. Betty Schwaller, Mrs. Lily Cold, Mrs. Lucy Foster, Willie Coleman, John Carroll and Spencer L. Jones, masters, officers and seamen, all employees of plaintiff and co-defendants representing themselves and others as a class, also peti-

tioners herein, respectfully pray that a Writ of Certiorari issue to review the opinion of the St. Louis Court of Appeals in favor of the City of St. Louis, Mo. and John K. Travers, its Collector, also defendants, which became final on December 13, 1971 when the Supreme Court of Missouri denied petitioners' application to transfer the case from the St. Louis Court of Appeals to the Supreme Court of Missouri, and to quash the opinion of the St. Louis Court of Appeals.

OPINION BELOW

The decision of the Supreme Court of Missouri denying transfer and the opinion of the St. Louis Court of Appeals, which is reported at 472 S. W. 2d 660 (Mo. 1971) both appear in the appendix hereto. The Circuit Court for the City of St. Louis, Missouri, rendered a judgment in favor of the petitioners accompanied by an opinion, which likewise appears in the appendix hereto. This judgment of the Circuit Court on appeal was reversed and remanded with directions by the St. Louis Court of Appeals.

JURISDICTION

The decision of the St. Louis Court of Appeals reversing the judgment of the Circuit Court and remanding the case with directions was entered on June 15, 1971. A timely motion for rehearing or in the alternative to transfer to the Supreme Court of Missouri was filed by petitioners and was denied on October 6, 1971 by the St. Louis Court of Appeals. A timely application to the Missouri Supreme Court to transfer, filed by petitioners, was denied on December 13, 1971 by that Court and this petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U. S. C. 1257 (3).

QUESTIONS PRESENTED

The questions involved in this application are as follows:

1. Is the decision of the St. Louis Court of Appeals holding that excursion boats on the Mississippi River which depart or operate excursion trips from St. Louis, Missouri, and return to St. Louis with no intermediary stops are not engaged in Interstate Commerce where in so operating they do so under I. C. C. permit and must of necessity, and do repeatedly cross the middle of the navigable channel on each trip, which forms the boundary line between the States of Missouri and Illinois and thus pass through and operate both in Missouri and Illinois waters on all trips and is not such a holding contrary to the decision of this Court in **Cornell Steamboat v. United States**, 321 U. S. 634, 88 L. Ed. 978, 64 S. Ct. 768, and **Central Greyhound Lines v. Mealey**, 334 U. S. 653, 62 L. Ed. 1633, 68 S. Ct. 1260, and the decision by the I. C. C. in **Sound Steamship Lines**, 250 I. C. C. 488, 3 Fed. Car. Cases 30387.

2. Does the fact that the Mississippi River forms the boundary between the States of Missouri and Illinois and the territorial limits of the two states end at their respective sides of the middle of the navigational channel of said river, 3 U.S. Statutes 545; 1 V. A. M. S. 97; 3 V. A. M. S., Chapter 7, p. 211, but which acts also provide that both states shall have concurrent jurisdiction over the entire river, cause an excursion vessel which starts its excursions at St. Louis and terminates them there without any intermediary stops but of necessity must, in so operating, constantly cross over the middle of the navigable channel, favoring neither the Missouri nor the Illinois side and in operating over and passing through the territorial waters of Illinois, as well as those of Missouri, because of such concurrent jurisdiction to lose the characteristic of being engaged in Interstate Commerce?

3. If engaged in Interstate Commerce, may the City of St. Louis obligate plaintiff-petitioner, the employer of captains, officers and seamen aboard its excursion vessels so operating, to withhold from their wages earnings taxes claimed to be due the City of St. Louis without depriving such employee-petitioners of their immunity under the provisions of Section 601 of Title 46, U. S. Code, prohibiting the attachment or arrest of seamen's wages and particularly that part thereof added to such section in 1959, and which reads:

> "* * * **And provided further**, that no part of the wages due or accruing to a master, officer, or any other seaman who is a member of the crew on a vessel engaged in the foreign, coastwise, intercoastal, interstate, or noncontiguous trade shall be withheld pursuant to the provisions of the tax laws of any State, Territory, possession, or Commonwealth, or a subdivision of any of them."

4. Has not the St. Louis Court of Appeals by its decision infringed upon the constitutional guaranties afforded these masters, officers and seamen, defendant-petitioners herein, all citizens of the United States granted them by the terms of Article Six, paragraph 2, the Supremacy Clause, Art. I, Sect. 8(3), the 14th Amendment of the United States Constitution?

5. Is not that part of the decision of the St. Louis Court of Appeals holding that the excursion vessels of plaintiff-petitioner never leave the jurisdiction of the State of Missouri even though they leave its territorial waters and enter the territorial waters of Illinois on all voyages and that therefore all wages earned by the employees on said excursion boats are earned in the State of Missouri and subject to the earnings tax provisions of Sections 145.010 to 145.120, inclusive, Revised Code of St. Louis, clearly deprive defendants-petitioners of the immunities conferred

by Section 601, Chapter 46 U.S.C. and thereby contravene Article VI, Section 2 of the United States Constitution, and Article I, Section 8(3) thereof, and the holdings of this Court in **Cornell Steamboat v. United States**, 321 U.S. 643, 88 L.Ed. 978, 64 S.Ct. 768, and in **Greyhound Lines v. Mealey**, 334 U.S. 653, 62 L.Ed. 1633, 68 S.Ct. 6820.

Is not this also an attempt by the Court of Appeals to deprive the State of Illinois of its fair share of taxes on these earnings of seamen by holding that these vessels are engaged in intrastate commerce and therefore subject only to the St. Louis Earnings Tax and was it not the specific purpose of the amendment to Sec. 601 of 46 U.S.C. to relieve seamen and their employers of deciding these complicated tax questions?

CONSTITUTIONAL PROVISIONS INVOLVED

Article VI, paragraph 2.

Article I, Sec. 8(3)
of the United States Constitution.

STATUTORY PROVISIONS

Section 601, 46 U.S.C.

STATEMENT OF THE CASE

This case involves a suit for a declaratory judgment brought on July 2nd, 1969, in the Circuit Court of the City of St. Louis, Missouri, by Streckfus Steamers, Inc., petitioner herein, hereinafter referred to as plaintiff-petitioner, against the City of St. Louis and John K. Travers, its Collector of Revenue, respondents herein; and also against Captain William F. Carroll, Captain Cornelius Riemer and other employees, who are defendants-petitioners herein, who plaintiff-petitioner, in its petition al-

leged were seamen and members of the crews of its excursion vessels, the S. S. ADMIRAL and the M/V HUCK FINN. The defendants-petitioners were made parties individually and as representatives of a class constituting such seamen employees of plaintiff-petitioner's company.

The case presents the question of whether or not plaintiff-petitioner may withhold, from the wages of defendants-petitioners earned aboard said excusion boats, the Earnings Tax claimed by the City of St. Louis, Missouri, in view of the amendment to the provisions dealing with attachment and arrest of wages of seamen contained in 46 U. S. C., Section 601, the amendment reads in part:

> "* * * And provided further, That no part of the wages due or accruing to a master, officer, or any other seaman who is a member of the crew on a vessel engaged in the foreign, coastwide, intercoastal, interstate, or non-contiguous trade shall be withheld pursuant to the provisions of the tax laws of any State, Territory, possession, or Commonwealth, or a subdivision of any of them."

Plaintiff-petitioner conducted its business pursuant to a Certificate of Convenience and Necessity, issued to it by the Interstate Commerce Commission under Part 3 of 49 U. S. C., Paragraphs 901 to 923, which certificate authorized plaintiff-petitioner to operate excursion boats in round-trip excursion service in interstate and foreign commerce from all ports and points along the Mississippi, Ohio and Illinois Rivers and returning to the port or points of origin. (See Record, p. 42 and Appendix, p. A-11, for copy of Certificate.) This was offered and received in evidence, but not mentioned in the opinion of the St. Louis Court of Appeals. Under this, plaintiff-petitioner has operated its excursion vessels on the Mississippi River from the City of St. Louis, Missouri, and returning to the point of origin without stopping elsewhere along the

route. The Mississippi River forms the eastern boundary of Missouri between the States of Missouri and Illinois and their respective territorial boundaries lie at the center of the navigable channel of said river. Act of Admission of Missouri into the Union, 3 U. S. Stat. 545, 1 V. A. M. S. 97, 3 V. A. M. S., Chapter 7, p. 211. Missouri and Illinois are given concurrent jurisdiction over the river by the same act.

In connection with operating such daily excursions, the excursion vessels of plaintiff-petitioner company on all excursions more or less constantly cross the middle thread or center of the channel favoring neither side and steering the boat according to conditions that exist at the time of the travel (See Opinion Appendix, p. A-2). Consequently, the boats navigate the territorial waters of both Missouri and Illinois.

The Respondents City of St. Louis and its Collector of Revenue plead that plaintiff-petitioner's vessels were not engaged in interstate trade or commerce on these excursion voyages within the meaning of Section 601 of 46 U. S. C. and prayed the Court to declare the wages of all of plaintiff's employees on their excursion vessels subject to its Earnings Tax, and plaintiff, itself, subject to the withholding provisions of the taxing ordinance.

The defendant employees, also petitioners herein, in this Court, joined with plaintiff-petitioner in seeking the immunity provided by Section 601 of 46 U. S. C.

Plaintiff-petitioner contended and contends that by thus operating on the Mississippi River and frequently and on all trips operating in part in Illinois waters, and in part in Missouri waters, it operates in Interstate Trade between the States of Illinois and Missouri and the wages of its seamen-employees, defendants-petitioners, are exempt from withholding for state taxes under 46 U. S. C. 601. The trial Court (the Circuit Court of the City of St. Louis) granted

a judgment in favor of petitioners. In connection therewith the trial Court wrote a Memorandum Opinion on January 6, 1970 (Record, p. 39, 40) holding that it clearly appears under **Cornell Steamboat v. United States**, 321 U. S. 634, 88 L. Ed. 978:

> "* * * that a water carrier on a boundary river is engaged in interstate commerce even though its point of departure is in the same state as its point of destination, if in so traveling it passes through the territorial waters of another state without landing there" (Appendix p. A-9).

Consequently the character of the activities carried on by plaintiff is one involving interstate commerce. The trial Court held further that an activity either involves Interstate Commerce or it does not, irrespective of the purpose or objective behind the Court's inquiry. It, as well as the St. Louis Court of Appeals, considered the words "Interstate Trade" as used in Section 601 of Chapter 46 to be synonymous with the words "Interstate Commerce." The trial Court also held that the broad term applied to the word "seamen" would cover the emplcyee-defendants aboard these vessels. The Court held that the exemption afforded by Section 601 of 46 U. S. C. applied to the wages of defendant-employees.

The City of St. Louis and John K. Travers, its collector, defendant-respondents herein, appealed to the St. Louis Court of Appeals. That Court reversed the trial Court and held (Appendix, p. A-8) that all the defendant-employees of plaintiff-petitioner herein (also co-petitioners herein), working aboard said vessels, as far as they, themselves, were concerned, and those whom they represented, as a class, remain at all times within the jurisdiction of Missouri because of its concurrent jurisdiction over the river with Illinois and, consequently, were not engaged in Interstate Commerce within the meaning of Section 601 of

46 U. S. C. The Court treats in its opinion the words "jurisdiction" and "sovereignty" as being synonymous. This it held in spite of its finding that plaintiff-petitioner's vessels on all voyages more or less constantly cross the middle of the navigable channel of the Mississippi River and thus operate at times in Missouri territorial waters and at times in Illinois territorial waters; that the wages of all these employee-defendants were subject to the Earnings Tax of the City of St. Louis and plaintiff-petitioner would have to withhold these taxes from wages earned aboard these ships and remanded the case to the Circuit Court of the City of St. Louis for further proceedings in accordance with its opinion.

Plaintiff-petitioner herein and defendants-petitioners timely filed their motion for rehearing or to transfer to the Supreme Court of Missouri, which was denied in the St. Louis Court of Appeals, and by timely application to the Supreme Court of Missouri for transfer. The Supreme Court of Missouri denied that thus exhausted all plaintiff-petitioner's and defendant-petitioners' state court remedies available to them. This Petition for Certiorari has been timely filed with this Court.

The Federal question as to the right to withhold state taxes from wages of seamen on interstate operation was raised under Act 601 of Title 46 U. S. C., a Federal Act at all stages. No constitutional questions were raised in the trial Court because the decision there was in favor of plaintiff-petitioner and defendants-petitioners. On appeal, after the Court of Appeals rendered its opinion that plaintiff-petitioner was engaged solely in intrastate commerce and, hence, in spite of the provision of Section 601, plaintiff-petitioner was required to withhold City Earnings Taxes from the wages of defendants-petitioners, the question that the opinion of the Court of Appeals contravened Paragraph 2 of Article VI of the United States Constitu-

tion and Article I of Section 8 (subsection 3) was promptly raised in the St. Louis Court of Appeals by both the plaintiff-petitioner and defendants-petitioners in their Motion for Rehearing or to transfer the case to the Missouri Supreme Court and later after the overruling of same it was again raised in their application to the Supreme Court for Order to the St. Louis Court of Appeals to transfer, which latter motion was again denied. The applicable provisions of the United States Constitution are: The Supremacy Clause, Article VI, Section 2 and the Commerce Clause, Article I, Section 8 (Subsection 3). The raising of the questions at that time was specifically approved in **Missouri v. Gehner**, 281 U. S. 313 (1929) at l.c. 320:

> "It is well settled that this court will not consider questions that were not properly presented for decision in the highest court of the State. Ordinarily it will not consider contentions first made in a petition to the state court for rehearing where the petition is denied without more. **Citizens National Bank v. Durr**, 257 U. S. 99, 106. But here the company, at the first opportunity, invoked the protection of the federal Constitution and statute. It could not earlier have assailed the section as violative of the Constitution and laws of the United States. The board of equalization completely eliminated the bonds from its calculations, and there is nothing in the language of the section to suggest that it authorizes any diminution of the amount of the deductible reserve and unpaid claims or an apportionment of such liabilities between taxable and nontaxable assets. It may not reasonably be held that the company was bound to anticipate such a construction or in advance to invoke federal protection against the taxation of its United States bonds. Upon the facts disclosed by this record it is clear that appellant sufficiently raised in the highest court of the State the federal questions

here presented and is entitled to have them considered. **Saunders v. Shaw**, 244 U. S. 317, 320. **Ohio ex rel. Bryant v. Akron Park District, ante, p. 74.**"

The Court of Appeals, in its opinion, admitted that at St. Louis the boundary between the States of Missouri and Illinois lies in the middle of a navigable channel of the Mississippi River in view of the provisions of 3 U. S. Statutes 545, 1 V. A. M. S. 97 and 3 V. A. M. S., Chapter 9, page 211, but in its effort to avoid the effect of the decision of **Cornell Steamboat v. United States**, 321 U. S. 634, 88 L. Ed. 978, 64 S. Ct. 768 took the position that the Amendment to Section 601 of U. S. C. 46 was for the purpose of preventing multiple withholdings from the wages of seamen who might be **in ports** of different states when they received their pay and that, consequently, the Amendment was added so as to protect such employers of seamen. This, it claims, is disclosed in 2 U. S. Code Congressional and Administrative News, 86th Congress, First Session 1959, pp. 2530-2536. It then concludes that since the seamen are paid only in St. Louis and that the mere fact that the vessels in question cross the middle of the channel of the river and travel in Illinois territorial waters would not place them in interstate commerce as a practical matter insofar as their compensation and payment thereof is concerned. Consequently, it reasoned that the withholding of Earnings Tax from wages of members of the crew would place no burden on the employer other than that associated with other wage earners or employees within the City of St. Louis and that considering interstate trade as a practical concept, the term as used in Section 601 would not encompass the operations of the STEAMER ADMIRAL and the M/V HUCK FINN, the vessels herein in question.

In trying further to avoid the effect of this Court's decision in **Cornell Steamboat v. United States**, 321 U. S.

634, 88 L. Ed. 978, 64 S. Ct. 768, the St. Louis Court of Appeals contended that that case could not have any effect in a case involving withholding taxes as it dealt merely with the right of the I.C.C. to deal with the rates and regulations set by the Interstate Commerce Commission, and which had to be uniform. The St. Louis Court of Appeals, in support of this position, relies on the earlier cases of this Court such as in **Cornell Steamboat Company v. Sohmer**, 235 U. S. 549, 59 L. Ed. 355, 35 S. Ct. 162 (1915). The St. Louis Court of Appeals, however, does admit that this holding was subsequently not followed in **Central Greyhound Lines, Inc. v. Mealey**, 334 U. S. 653, 92 L. Ed. 1633, 68 S. Ct. 1260 (1948), which criticized the earlier **Cornell Steamboat** case in 235 U. S., supra. The St. Louis Court of Appeals does not mention that the **Central Greyhound** case involved the imposition without apportionment of a state gross receipts tax on passengers carried in interstate commerce.

The St. Louis Court of Appeals also bases its decision on cases such as **Cincinnati, Portsmouth, Big Sandy and Pomeroy Packet Company v. Bay**, 200 U. S. 179, 50 L. Ed. 428, 26 S. Ct. 208, none of which cases conform to the concept as later expressed by this Court as to what does and what does not constitute interstate commerce.

The Court also claims that at the time of the admission of the State of Missouri to the Union, the boundary line between it and the State of Illinois was fixed at the middle of the main navigable channel of the Mississippi River, but that the Act goes further and confers concurrent jurisdiction on the two states over the river. From this, it takes the position that because of this concurrent jurisdiction, the vessels in question that leave and return to the Port of St. Louis without interrupting their voyage remain at all times within the jurisdiction of the State of Missouri even though they on all trips cross the middle

of the channel of the river and enter the Illinois territorial waters and, hence, are not engaged in Interstate Commerce; that the activities of plaintiff-petitioner are purely intrastate, and the Court finally concluded that both the employees of plaintiff who work on these vessels and that plaintiff are not covered by the provisions contained in Section 601 of 46 U. S. C., as long as these vessels remain in the excursion trade described in the opinion.

The holding of the St. Louis Court of Appeals was fully challenged on motion for rehearing on the grounds that it was contrary to the aforestated constitutional provisions and to the prevailing law as enunciated by the Supreme Court of the United States in the cases of **Cornell Steamboat v. United States**, 321 U. S. 634, 88 L. Ed. 978, 64 S. Ct. 768, wherein the Court specifically held although not in N. J. that "While moving on New Jersey waters, Cornell's vessels are not at that time at a place in New York," and to the case of **Central Greyhound Lines, Inc. v. Mealey**, 334 U. S. 653, 92 L. Ed. 1633, and was contrary to the views expressed by the I. C. C. in its opinion in the case of **Sound Steamship Lines**, 250 I. C. C. 488, 3 Fed. Car. Cases 30387, and contrary to the provisions of Article VI, Section 2 and Section 8(3) of Article I of the United States Constitution, but was denied. It was again challenged for the same reasons on petitioner's motion to transfer to the Supreme Court of Missouri but which Court refused to transfer the case.

REASONS FOR GRANTING WRIT

The St. Louis Court of Appeals refused to apply to defendants-petitioners the immunity granted them by Sec. 601 of 46 U. S. C. whereby it is provided that no part of the wages due or accruing to a master, officer or any other seaman who is a member of the crew on a vessel engaged in interstate trade shall be withheld pursuant to the tax laws of any State, Territory, Possession or Commonwealth or a subdivision thereof. By so doing it deprived these seamen of a privilege granted them by Article VI, Cl. 2 of the United States Constitution and Clause 8(3) of Art. I thereof.

a. This decision of the St. Louis Court of Appeals is a decision which affects many carriers which operate on the Mississippi River and not only those engaged in the excursion boat business. It presents a very vital question to these operators as to withholding taxes. Since 1945, traffic on the Mississippi River from Minneapolis, Minnesota, to the Passes at its mouth in Louisiana increased from 23,000,480 short tons to 147,652,609 short tons in 1970 (see **Waterborne Commerce of the U. S., Part II, Waterways and Harbors and Gulf Coast on the Mississippi River System,** the official publication of the United States Engineers, these figures appearing respectively in the 1945 edition at page 130 and in the 1970 edition at page X). Consequently, many of these operators will be affected by the decision of the St. Louis Court of Appeals.

b. The St. Louis Court of Appeals denied to these masters, pilots and seamen, defendants-petitioners herein, representing themselves and other similarly situated employees whom they represented as a class the immunity provided them by Sec. 601 of 46 U. S. C., by holding that plaintiff-petitioner, while operating their excursion ves-

sels on the Mississippi River, departing from the City of St. Louis and returning thereto without any intermediary stops, was not in interstate commerce, even though on all trips these vessels cross the middle thread of the main channel more or less constantly, favoring neither but steering the vessels according to conditions that existed at the time of travel (Appendix, p. A-7). The middle of the main channel forms the boundary line between these two states (Act of Admission of the State of Missouri into the Union, 3 U. S. Stat. 545; 1 V. A. M. S. 97, 3 V. A. M. S., Chapter 7, p. 211. Thus, the plaintiff-petitioner operates on all trips a substantial part of the time within the territorial waters of Illinois.

The question of what constitutes interstate commerce has been repeatedly held, indeed, it is Hornbook law that "the question of what is interstate commerce is a federal question, and the decision of the United States Supreme Court defining such commerce and determining the validity of regulations thereof and interferences therewith are controlling," 15 Am. Jur. 2d, Commerce, §5.

In **Oskey Brothers Petroleum Corp. v. Gorder**, 109 N. W. 2d 893 (1961), the Supreme Court of South Dakota stated in this regard:

> "Whether a transaction was interstate commerce is dependent upon the interpretation of the Federal Constitution upon which the judicial determination of the Supreme Court of the United States is final."

Further, in **Osgood Company v. Bland**, 24 Tenn. App. 126, 141 S. W. 2d 505 (1940), the Tennessee Court of Appeals held:

> "Whether a transaction by a foreign corporation is interstate commerce, as distinguished from intrastate commerce, is a federal question and the decisions of the United States Supreme Court must be followed by our state courts."

This being so, the St. Louis Court of Appeals must follow the decisions of this Court on this subject. Its decision that plaintiff-petitioner and defendants-petitioners are not engaged in interstate commerce flies directly in the teeth of the latest pronouncements of this Court on this subject, which holds that a vessel engaged in commerce between two points in the same state, and in so doing passing through territorial waters of an adjoining state, forming a common boundary between them, is engaged in interstate commerce and subject to regulation of the Interstate Commerce Commission (Part 3 of the Act) although its vessels never land in the adjoining state, **Cornell Steamboat v. United States**, 321 U. S. 634, 88 L. Ed. 978, 64 S. Ct. 768 (1943). The same conclusion was reached as to the auto-bus business in **Central Greyhound Lines v. Mealey**, 334 U. S. 653, 92 L. Ed. 1633, 68 S. Ct. 1260 (1948).

c. The St. Louis Court of Appeals fails in its opinion to mention the fact that these excursion trips are conducted by plaintiff-petitioner pursuant to a Certificate of Convenience and Necessity from the Interstate Commerce Commission offered and received in evidence, hereto attached (Appendix, p. A-11) and appears as part of the record at page 42, probably because that Commission has held in **Sound Steamship Lines**, 250 I. C. C. 488, 3 Fed. Car. Cases 30387, that an excursion vessel such as these operated from a point in one state (New York City) and returning to the same point without stopping but passing through territorial waters of an adjoining state (New Jersey) though not stopping there, was engaged in interstate commerce and requires a Certificate of Convenience and Necessity from the Interstate Commerce Commission.

d. The St. Louis Court of Appeals, in trying to justify its failing to follow the case of **Cornell Steamboat Co. v. United States**, reported in 321 U. S. 634, 88 L. Ed. 978,

64 S. Ct. 768 (1943), argues that that case did not involve a taxation question but only the necessity of holding an I. C. C. Certificate, and, hence, is not applicable. It cites an earlier case involving **Cornell Steamboat Co. v. Sohmer**, 235 U. S. 549, 59 L. Ed. 355, 35 S. Ct. 162 (1915), involving gross earnings tax of New York State on earnings arising in part from voyages over adjoining territorial waters. This Court at that time (1915) held that vessels proceeding from one point in a state to another point in the same state, but in doing so, passing through territorial waters of an adjoining state were not in interstate commerce and all of its gross earnings were subject to that tax. That earlier decision was not followed by this Court in **Central Greyhound Lines, Inc. v. Mealey**, 334 U. S. 653, 92 L. Ed. 1533, 68 S. Ct. 1260 (1948), involving the same New York gross receipts tax as was involved in the earlier **Cornell Steamboat** case. This Court criticized the holding in the earlier **Cornell Steamboat** case at l.c. 642 and would not follow same. The Court held at l.c. 659:

> ". . . But to label transportation across an interstate stream 'local commerce' for some purposes when it is 'interstate commerce' in other relations, see, e.g., **Covington & Cincinnati Bridge Co. v. Kentucky**, 154 U.S. 204, is to use loosely terms having connotations of constitutional significance. To call commerce in fact interstate 'local commerce' because under a given set of circumstances, as in the **Lehigh Valley** case, a particular exertion of State power is not rendered invalid by the Commerce Clause is to indulge in a fiction. Especially in the disposition of constitutional issues are legal fictions hazardous, because of the risk of confounding users and not merely readers. The kind of confusion to which the **Lehigh Valley** opinion has given rise results from employing a needless fiction—calling commerce local which in

> fact is interstate—as a manner of stating that a particular exercise of State power is not invalid even through it affects interstate commerce. The difficult task of determining whether a phase of commerce, concededly interstate, is subject to a particular incidence of State regulation, through taxation or otherwise, is not lessened by calling interstate commerce local commerce in order to sustain its local control. To state this persistent and protean problem of our federalism in the form of a question-begging fiction, is not to answer it."

Thus, this Court held that the New York gross receipts tax must be apportioned as a substantial portion of Greyhound's trips passed through adjoining states although starting and ending in the State of New York, and, consequently, Greyhound Lines was engaged in interstate commerce. In this present case, as found by the St. Louis Court of Appeals, the vessels **more or less constantly crossed the middle of the channel** according to varying conditions, thus navigating the territorial waters of Illinois and Missouri frequently on these voyages. They never remain only on one side (Appendix, p. A-2). Thus, the rule of both **Cornell Steamboat Co.**, 321 U. S. and **Central Greyhound Lines**, 334 U. S. apply here.

From the foregoing, it is also clear that it makes no difference on the question of what constitutes interstate commerce whether the case involves taxation or the jurisdiction of the I. C. C. to require a Certificate of Convenience and Necessity. What constitutes interstate commerce remains the same and the trips, such as are carried on by plaintiff-petitioner, are interstate commerce and no part of the wages of defendants-petitioners can be withheld for state and local taxes.

Another case by which the St. Louis Court of Appeals attempts to justify its failure to follow the dictates of

Section 601 of Chapter 46 U. S. C., **Cincinnati, Portsmouth, Big Sandy and Pomeroy Packet Co. v. Bay**, 200 U. S. 179, 50 L. Ed. 428, 26 S. Ct. 208, decided in 1908, did not involve either an I. C. C. permit or a tax on interstate operation such as here but the Sherman Act, and needless to say, is of a time when the present concept of interstate commerce had not been extended as it is now.

e. Another attempt to try and circumvent the express provisions of Section 601 of 46 U. S. C. and the decisions of the **Cornell Steamboat** case reported in 321 U. S. and **Central Greyhound Lines** reported in 334 U.S., both supra, as to what constitutes interstate commerce is the assertion by the St. Louis Court of Appeals in its opinion that the proviso added to Section 601 had a specific purpose, and that according to that Court it was to prevent multiple withholdings from the wages of seamen who might be in ports of different states when receiving their pay. It further recites that the purpose **was also stated** that instead of being subject only to the withholding laws of their state of residence, or their home port, every state, local political subdivision or municipality having such power, could require withholding merely because the seaman happened to be in that jurisdiction **when paid.**

But that was not the only reason: In speaking of the need for the bill the Senate Report appearing in 2 U. S. Code Congressional and Administrative News, First Session, 1959, pp. 2530 to 2536 is set out at page 2531, as follows:

> The important maritime States of New York and Massachusetts have recently enacted withholding provisions in their income tax laws that would affect seamen's wages. It is likely that other States will do the same. As a result of the conflict between the Federal law and the State provisions, the shipowners are faced with a staggering potential legal and financial

liability if they do not withhold as apparently directed by title 46, United States Code, section 601, or if they do withhold as apparently required under State tax laws. Your committee believes legislation is immediately required to resolve this dilemma.

Furthermore, your committee believes that the costly and complex bookkeeping imposed on seamen and shipowners by multiple State withholding laws is all out of proportion to the benefit to the States in the case of seamen. All the more so since it is likely that several States will enact similar withholding provisions. Consequently, the shipowner will have to prepare withholding tax forms for each seaman for each State for each voyage covering the wages to be paid in each State.

Similarly, the seamen will be subject to multiple taxation by a large number of States and municipalities. The multiple State tax laws imposed upon the seaman will make it impossible for him to handle his tax without employing professional help.

* * * * * * *

and the effect of the legislation is stated at page 2532, as follows:

"S.1958 would relieve the seamen and the steamship companies of the accounting burden enumerated above; it would also clarify the legal conflict between State and Federal law.

It is to be noted, however, that this legislation will not relieve the seamen of his liability to pay taxes properly due, will not effect the Federal withholding taxes, and will not in any way impair the general tax authority of the States."

Of this, the St. Louis Court of Appeals makes no mention.

From the foregoing, **the place of payment is not the determining factor but the possibility that different with-**

holding taxes of different states and their subdivisions will have to be withheld. Section 601 was amended when the States of New York and Massachusetts had adopted income tax withholding provisions and such action by other states was anticipated. Since 1969 the State of Illinois has such a withholding provision in its income tax statutes. By Chapter 120, Section 7-701 of the Illinois Revised Statutes of 1969, it is specifically provided that:

> "Every employer maintaining office **or transacting any business in state** and required to withhold federal income tax on compensation paid in state to an individual **must deduct and withhold, from wages paid or earned on or after Aug. 1, 1969,** an amount equal to 2½% of compensation after deducting appropriate withholding exemption attributable to payroll period." [Emphasis Ours.]

Consequently, Illinois does require any corporation doing business within its state to withhold from the wages of its employees from wages paid or earned as of August 1, 1969, the requisite income tax. As all defendants-petitioners earn part of their wages in Illinois territorial waters, we are dealing with the exact situation which Section 601 of 46 U. S. C. sought to remedy.

Even had Illinois not enacted such a statute or sought to enforce it, it would not change the end result for in the case of **Greyhound Lines v. Mealey**, 334 U. S. 653, this Court held at page 662:

> "It is significant that, so far as we are advised, no State other than New York seeks to tax the unapportioned receipts from transportation going through more than one State (except to an extent so insignificant as to be disregarded), merely because such transportation returns to the State of its origin. If New Jersey and Pennsylvania could claim their right to make appropriately apportioned claims against that substantial part of the business of appellant to which

> they afford protection, we do not see how on principle and in precedent such a claim could be denied. This being so, to allow New York to impose a tax on the gross receipts for the entire mileage—on the 57.47% within New York as well as the 42.53% without—would subject interstate commerce to the unfair burden of being taxed as to portions of its revenue by States which give protection to those portions, as well as to a State which does not."

Nor is this a case for holding that the interstate commerce involved in this case is a question of de minimis for on the entire trips, these vessels constantly cross the middle of the channel and repeatedly enter the territorial waters of Missouri and Illinois on each trip.

f. The decision of the St. Louis Court of Appeals to the effect that these vessels on the excursion trips remain in the jurisdiction of Missouri and that the salaries of all employees are earned aboard said excursion boats and are subject to the withholding provisions of the earnings tax of the City of St. Louis while on these excursion boats in spite of the fact that the vessels constantly cross into and operate on the territorial waters of Illinois, is an effort on the part of the Missouri Court of Appeals to foreclose any possible claim by the State of Illinois under their State Income Tax Law to claim any part of these wages and the withholding provisions of any part of the wages earned aboard this ship. By doing so, the Court of Appeals does not attempt to apportion claims for taxes by the City nor the State of Missouri with the claim for taxes on wages earned in Illinois under the Illinois Statute. It is exactly to prevent a taxation by both states and their subdivisions and their apportionment that Section 601 was amended in 1959. The St. Louis Court of Appeals wishes to brush the fact aside that on all excursion trips the vessels cross the middle of the channel practically constantly and, thus operate a substantial part of the way in

Illinois territorial waters by saying that as a "practical matter" it would not place these vessels in interstate commerce. That overlooks the specific holdings of this Court that it does.

g. The St. Louis Court of Appeals in its opinion goes on to say that since these vessels start and return to St. Louis without any interruption by mooring or anchoring along this line of travel, withholding of the City Earnings Tax would not place a burden upon them or their employers other than that of any wage earner or employee within the City of St. Louis. Since, however, Illinois impose an earnings tax on the wages earned in that state, the withholding of the wages or part thereof would, contrary to the holding of that Court, place a burden upon the employer other than that of any wage earner or employer in the City of St. Louis and it is specifically for the purpose of avoiding the necessity of the employer having to figure out what portion was earned in Illinois and what portion in St. Louis that this specific Act was passed as we pointed out above at page A-20.

h. The Court finally states in its opinion, speaking of these excursion trips, "For these boats that leave and return to the Port of St. Louis without interrupting their voyage remain at all times within the jurisdiction of Missouri even though at times they cross the middle of the channel" (App. p. A-7). The Court reaches this conclusion by relying upon the Act of Admission of the State of Missouri, 3 U. S. Stat. 545, 1 V. A. M. S. 97, 3 V. A. M. S., Chapter 7, page 11, which sets the boundary line between the States of Illinois and Missouri along the middle of the navigable channel, but confers concurrent jurisdiction on both states over the entire river. The fallacy of this conclusion is easily demonstrated. With the exception by the State of Louisiana, the Mississippi River constitutes a boundary river between all states along its banks. Were the Court correct in its position that the

vessel which starts at one point in Missouri and returns to the same point after an excursion voyage at which it does not stop along the line, but does for a substantial portion of each voyage cross and navigates the Illinois territorial waters; yet because of concurrent jurisdiction of the two states, the vessels remain in the State of Missouri at all times then neither plaintiff-petitioner or any other carrier would require a Certificate of Convenience and Necessity from the Interstate Commerce Commission under Chapter 3, Title 49 of the U. S. Code. The Federal Courts have not looked upon such a conclusion with favor, see **Cornell Steamboat Company v. U. S.**, 321 U. S., supra, nor has the Interstate Commerce Commission, **Sound Steamship Lines**, 250 I. C. C. 488, 3 Fed. Car. Cases, 3387 but have held to the contrary.

The Court's holding that since Missouri has concurrent jurisdiction with Illinois over the entire river, therefore, the vessels never leave Missouri on their trips, is wholly unsound. Were that correct then as soon as these vessels cast off from the Missouri shore, they would automatically find themselves both in Missouri and in Illinois at the same time if "sovereignty" and "jurisdiction" are to be treated as synonymous. If, as here, one finds oneself on a trip in two different states, then to contend that this is not Interstate Commerce completely overlooks the meaning of those words. The difficulty with the St. Louis Court of Appeals in reaching the conclusion is that it does not distinguish between the meaning of the word "jurisdiction" and the meaning of the word "sovereignty."

The same Court of Appeals held in **Smoot v. Fisher**, 248 SW 2d 38, at l. c. 41, as follows:

> "It is to be understood that in conferring concurrent jurisdiction on this state as to acts or transactions occurring on the Mississippi, **it was not intended that there should be concurrent sovereignty or dominion on the river.** On the contrary, in the case

of matters not included in the proper concept of concurrent jurisdiction, each of the adjoining states retains its exclusive control up to the limits of its actual boundary, entirely free from the interference by the other."

The power to tax is a sovereign power, whereas, the power to enforce the laws other than taxing, such as criminal laws, and in certain areas of civil law, is something else again. In **Nielsen v. Oregon**, 212 U. S. 315, 53 L. Ed. 528, 29 S. Ct. 383, the Court, in speaking of the term "concurrent jurisdiction", at page 320 had the following to say:

> "Undoubtedly one purpose, perhaps the primary purpose, in the grant of concurrent jurisdiction was to avoid any nice question as to whether a criminal act sought to be prosecuted was committed on one side or the other of the exact boundary in the channel, that boundary sometimes changing by reason of the shifting of the channel."

The taxing powers of the two states are not concurrent and the judgment of the St. Louis Court of Appeals directing the trial Court to hold that the wages earned by defendants-petitioners aboard these two vessels on their excursion trips are subject to the City Earnings Tax and must be withheld by plaintiff-petitioner is clearly erroneous in that it makes no allowance for those wages which are earned while the vessels are on the Illinois side of the river. It attempts to arrogate taxes on all earnings of these employees to St. Louis excluding any right of the State of Illinois to tax any part of wages earned in Illinois.

It is Hornbook law that the power to tax is strictly limited to the territorial limits of the state. As stated in 61 C. J., Taxation, Section 16:

> "Moreover, the exercise of the taxing power in respect of persons and property beyond the terri-

torial **limits** of the state would vitiate the Fourteenth Amendment of the federal constitution and cases there cited."

See also **Arnold v. Berra,** 366 S. W. 2d 321.

What the City is trying to enforce in this case is a municipal taxing ordinance and not a police regulation. The **City's** power to impose even a municipal police regulation ceases at the middle of the main channel, whereas, as to a police regulation of the **state,** that is concurrent. See the **City of St. Louis v. Lee,** 132 S. W. 2d 1055.

The point we are trying to make is simply that the City of St. Louis may not impose any Earnings Tax on the wages of seamen earned on excursion or other voyages on which the vessels spend on each trip part of the time in Missouri territorial waters and part of the time, without stopping, in those of Illinois; even less can it do so where the State of Illinois also has an Earnings Tax and the trips are clearly in interstate commerce. It is for the purpose of laying at rest the need of employers and seamen to solve the complicated tax questions that the amendment to Section 601 of Title 46 U. S. C. was enacted.

CONCLUSION

This Court has not as yet passed upon the Amendment of 1959 to Section 601 of Title 46, which is here involved, insofar as the immunity of seamen's wages from withholding taxes is concerned earned on vessels plying on boundary rivers such as here and in so doing repeatedly enter into and navigate the territorial waters of an adjoining state. This Court has only held so far that such operations constitute interstate commerce with reference to both the requirement that plaintiff-petitioner is within the operation of Chapter 3 of the Interstate Commerce Commission Act, as well as to gross income derived from trips within one state and passing through an adjoining state, though not stopping in such adjoining state.

From the foregoing, we believe it is also clear that the decision of the St. Louis Court of Appeals decides a question of substance in a way probably not in accord with the applicable decisions of this Court. The decision which we claim is wrong as rendered by the St. Louis Court of Appeals is a matter of grave importance to many carriers, not only on the Mississippi River, but on the Ohio River and, undoubtedly, also on the Columbia River. The Mississippi River forms the boundary between all states bordering its shore other than the State of Louisiana. Consequently, all these bordering states are vitally interested in whether or not a water carrier which operates within the territorial waters under its sovereignty and then crosses into the territorial waters of the adjoining boundary state, though not stopping there, is engaged in interstate commerce, and whether Section 601, 46 U. S. C., applies to such operation. It is a question which this Supreme Court should finally settle rather than the St. Louis Court of Appeals.

Respectfully submitted

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OPINION AND JUDGMENT BELOW

Streckfus Steamers, Inc., Plaintiff-Respondent,

v.

City of St. Louis and John K. Travers, Collector of Revenue for the City of St. Louis, Defendants-Appellants,

Capt. Wm. F. Carroll et al., Defendants-Respondents.

No. 33787.

St. Louis Court of Appeals,
Missouri.

June 15, 1971.

Motion for Rehearing or to Transfer to Supreme Court Denied Oct. 6, 1971.
Application to Transfer Denied Dec. 13, 1971.

WEIER, Commissioner.

In this declaratory judgment action, plaintiff sought and obtained a judgment of the circuit court that all shipboard employees of the steamer Admiral and motor vessel Huck Finn were members of the crews of vessels engaged in interstate trade and hence, under the provisions of Section 601, 46 U.S.C.A., the plaintiff was not compelled to withhold city earnings tax. To determine the propriety of the judgment on appeal, we must resolve the nature of the trade in which the vessels were engaged. If it was interstate, then Section 601 prohibits the withholding of taxes from members of the crews. If it was intrastate, this section would not be applicable, and the defendant

city would be entitled to enforce its withholding tax ordinance, Section 145.060, Revised Code of St. Louis.

The facts are undisputed. Plaintiff presented all the evidence except a copy of the earnings tax ordinance which was introduced by the city. Plaintiff has been engaged in the operation of excursion boats on the Mississippi River. The two vessels involved in this controversy are the steamer Admiral and the motor vessel Huck Finn. The Admiral makes day and night excursions on the river, which start and end at St. Louis. All passengers board the vessel at that city and land there. No freight is carried. No landings are made at any place other than St. Louis to take on or discharge passengers. It makes no trip to any port other than St. Louis. In its travel on the Mississippi this vessel crosses the middle of the channel of the river. The master of the vessel stated he crossed the middle thread of the channel more or less constantly, favoring neither side but steering the boat according to conditions that existed at the time of travel.

The motor vessel Huck Finn is also engaged in the excursion business. It is used for hourly narrated sightseeing trips during the day and charter trips, at night. It too departs from and returns to St. Louis. In its course of travel it also crosses and recrosses the center of the river channel. But, just as the Admiral, it operates only out of St. Louis.

The earnings tax ordinance of St. Louis imposes a one per centum tax on the wages of all employees subject to the tax who are residents of the City of St. Louis, and also on that portion of the earnings of non-residents of the City of St. Louis attributable to services performed within the City. The collector of revenue of St. Louis has made demand upon plaintiff to withhold city earnings tax from the wages of all employees on the Admiral and Huck Finn. Plaintiff has refused and filed for declaratory judg-

ment to uphold its refusal because of the exemption contained in Section 601, 46 U.S.C.A., which reads in part as follows:

> "* * * *And provided further*, That no part of the wages due or accruing to a master, officer, or any other seaman who is a member of the crew on a vessel engaged in the foreign, coastwise, intercoastal, interstate, or noncontiguous trade shall be withheld pursuant to the provisions of the tax laws of any State, Territory, possession, or Commonwealth, or a subdivision of any of them."

In answering plaintiff's petition, the defendants City of St. Louis and its collector of revenue have affirmatively pleaded that the vessels were not engaged in interstate trade within the meaning of Section 601, and pray that the court declare the wages of employees of plaintiff are subject to the earnings tax and the plaintiff itself subject to the withholding provisions of the tax ordinance. The defendant employees, who are named individually and as members of a class representing all employees, join with plaintiff in seeking the exemption provided by Section 601.

In sustaining the plaintiff's position, the court below determined that plaintiff's vessels were engaged in interstate trade within the purview of Section 601 and that the wages of all personnel employed thereon were exempt from withholding of the city earnings tax. Defendant city on appeal contends that the vessels were not engaged in interstate trade within the meaning contemplated by congress when it passed this proviso in 1959 (Pub.L., 86-263, 73 Stat. 551), and hence the wages of all persons employed on the vessels were subject to the withholding.

[1] As to the word "trade", we have no difficulty in equiting it with the carriage of passengers in the excursion business. The word is frequently used with "commerce" in the laws of the United States, as in the Sher-

man Act (15 U.S.C.A. Sec. 1), and is commonly used in the shipping industry to describe the business engaged in regularly, such as the "spice trade" or the "trade" with a foreign country or area. (See generally: Webster's Third New International Dictionary). In the sense here used it is the transportation or carrying "trade" and encompasses the transport and carriage of passengers. "Trade" is included in "commerce", (United States v. South-Eastern Underwriters Association, 322 U.S. 533, 539, 64 S.Ct. 1162, 88 L.Ed. 1440), and, being a part thereof, its significance and meaning when used with the word "interstate" should be the same. We therefore apply the term "interstate trade" to the facts at bar as we would "interstate commerce". In such application we are admonished: "• • • interstate commerce is an intensely practical concept drawn from the normal and accepted course of business." United States v. Yellow Cab Co., 332 U.S. 218, 231, 67 S.Ct. 1560, 1567, 91 L.Ed. 2010.

[2] The proviso attached to Section 601, supra, in 1959, was obviously for a specific purpose. As indicated in the reports contained in 2 U.S. Code Congressional and Administrative News, 86th Congress—First Session 1959, pp. 2530-2536, the amendment to this section was to prevent multiple withholdings from the wages of seamen who might be in ports of different states when they received their pay. Instead of being subject only to the withholding laws of their state of residence, or their home port, every state, local political subdivision or municipality having such power, could require withholding merely because the seaman happened to be in that jurisdiction when paid. In addition, the ship owner or operator, would be faced with an almost impossible task of complying with myriad state and local tax withholding laws.

[3] In the case before us there appear no such problems. The members of the crews of the vessels here involved do not land at any port other than that of the City of St.

Louis. They report for duty there and they leave their employment daily at the same place. The mere fact that at some time, while on duty, their vessel may cross the middle of the channel of the river would not place them in interstate commerce as a practical matter so far as their compensation and the payment thereof is concerned. Conceivably—and there is no evidence to the contrary—the boats could be so steered and maneuvered that they need never cross the middle of the channel. Their journey is purely for pleasure and amusement of the passengers. They leave St. Louis and return to St. Louis with no interruption of the voyage by mooring or anchoring at any other place. The withholding of earnings tax from wages of members of the crews would place no burden upon them or their employer other than that associated with any other wage earner or employer within the City of St. Louis. Considering interstate trade as a practical concept, the terms as used in Section 601 do not encompass the operations of the steamer Admiral and the motor vessel Huck Finn.

Streckfus Steamers, Inc., the plaintiff, defendant employees, who are also respondents, and the court below rely in large part upon the case of Cornell Steamboat Co. v. United States, 321 U.S. 634, 64 S.Ct. 768, 88 L.Ed. 978. This case involved the meaning of "interstate transportation" used in the Interstate Commerce Act (Chap. 49, U.S.C.A.) Cornell contended it was not so engaged and that the Interstate Commerce Commission had no power to regulate. The facts disclosed that five per cent of its business was between the States of New York and New Jersey and that a substantial part of the remainder of their business was carried on in tows that moved over New Jersey waters, even though the freight was being moved from port to port in New York. Aside from the finding that five per cent was undoubtedly interstate transportation, the court also relied on the case of Missouri Pacific R. R. Co. v. Stroud, 267 U. S. 404, 45 S.Ct. 243,

69 L.Ed. 683. This case, like the earlier case of Hanley v. Kansas City Southern Railway Co., 187 U.S. 617, 23 S.Ct. 214, 47 L.Ed. 333, concerned regulation of railroads on point-to-point rates within the same state where the railroad line ran across a part of another state in its travel between these points. There, practical application of the law required that "interstate transportation" be interpreted to include such a pattern of travel so rates might be uniform and established as a whole.

It is interesting to note that in another case involving Cornell (People of the State of New York on the relation of Cornell Steamboat Company v. Sohmer, 235 U.S. 549, 35 S.Ct. 162, 59 L.Ed. 355), the court found that the portion of the transportation originating and terminating in New York was not interstate commerce, even though as to a part of the journey the tows passed over the territory of another state. This case involved taxation by the State of New York on gross earnings as to that part of Cornell's business conducted in New York. Although the doctrine there enunciated was later criticized and not followed in Central Greyhound Lines, Inc. v. Mealey, 334 U.S. 653, 68 S.Ct. 1260, 92 L.Ed. 1633, it is an example of an application of the doctrine that interstate commerce is a practical concept, not a technical one, and must depend upon the facts in each case.

Bearing upon this concept is the decision of Mr. Justice Holmes in Cincinnati, Portsmouth, Big Sandy and Pomeroy Packet Company v. Bay, 200 U.S. 179, 26 S.Ct. 208, 50 L.Ed. 428. The court there had before it the legality of a contract not to compete in transportation on the Ohio River between Ohio points for a period of five years. The Sherman Act (15 U.S.C.A. Sec. 1) declares every contract in restraint of trade or commerce among the several states to be illegal. In finding that the contract did not violate the Sherman Act, the court said: "It would be an extravagant consequence to draw from Hanley v. Kansas

City Southern R. Co., 187 U.S. 617, 23 Sup.Ct.Rep. 214, 47 L.Ed. 333—a case of a State attempting to fix rates over a railroad route passing outside its limits,—that the contract was within the Sherman Act because the boats referred to might sail over soil belonging to Kentucky in passing between two Ohio points." (l.c. 200 U.S. 183, 26 S.Ct. 209).

[4, 5] When Missouri was admitted to the Union as a State, the Act of Congress authorizing the people of Missouri to form a constitution and state government, (3 U.S. Stat. 545; 1 V.A.M.S. 97; 3 V.A.M.S. Chap. 7, p. 211) set out the boundaries of the proposed state. At St. Louis where Missouri borders the State of Illinois, the boundary line is the middle of the main channel of the Mississippi River. However, the act goes further and gives to Missouri concurrent jurisdiction on the river. This has been construed to mean that the sovereignty of the State of Missouri, having accepted the act, extends anywhere on that river. Sanders v. St. Louis & N. O. Anchor Line, 97 Mo. 26, 10 S.W. 595, 597; cf. Gerhard v. Terminal Railroad Association of St. Louis, Mo. 299 S.W.2d 866, 869 [2, 3]; 49 Am.Jur., States, Territories, and Dependencies, Sec. 24, p. 244. We refer to this not to indicate that authority has vested in the City of St. Louis as a political subdivision of the State of Missouri to override an act of Congress affecting interstate commerce, but, rather, as additional reason to find that the excursion-boat operation presented here by the facts is not an interstate operation within the meaning of Section 601. For these boats that leave and return to the port of St. Louis without interrupting their voyage remain at all times within the jurisdiction of Missouri, even though they, at times, cross the middle of the channel of the river.

The earnings tax of the City of St. Louis has previously been held to be a constitutional tax and not a burden on interstate commerce, even though the individual whose

wages are subject to tax lives in another state. Arnold v. Berra, Mo., 366 S.W.2d 321. The individual defendant employees in the case before us, irrespective of their residence, work on boats whose business operations under the evidence are purely intrastate. The exemption provided members of the crew under Section 601, 46 U.S.C.A., applies to a vessel which is engaged in interstate trade. The exemption provided by this section may not be relied on by any employees of plaintiff who work on the steamer Admiral and motor vessel Huck Finn or by plaintiff, as long as these vessels remain in the excursion trade described in this opinion. This rules the case and we will not attempt to determine whether certain employees are, or are not, members of the crews on these respective vessels within the meaning of Section 601.

For the reasons given, the judgment of the circuit court is reversed. The case is remanded with directions to deny plaintiff's petition. In accordance with the affirmative matters pleaded and the prayer contained in the answer of defendants, City of St. Louis and John K. Travers, Collector of Revenue of the City of St. Louis, the court below is further directed to adjudge and decree that all employees of plaintiff who receive their compensation as a result of services performed in connection with the operation of the excursion boats, the steamer Admiral and the motor vessel Huck Finn, are subject to the provisions of Sections 145.010 to 145.120, incl., Revised Code of St. Louis, the ordinances of the City of St. Louis imposing an earnings tax, and that the plaintiff is further subject to the provisions of the ordinance which requires it to withhold earnings taxes from the wages of said employees, Section 145.060, Revised Code of St. Louis.

PER CURIAM.

The foregoing opinion by WEIER, C., is adopted as the opinion of this Court. Accordingly, the judgment of the circuit court is reversed. The case is remanded with di-

rections to deny plaintiff's petition. In accordance with the affirmative matters pleaded and the prayer contained in the answer of defendants, City of St. Louis and John K. Travers, Collector of Revenue of the City of St. Louis, the court below is further directed to adjudge and decree that all employees of plaintiff who receive their compensation as a result of services performed in connection with the operation of the excursion boats, the steamer Admiral and the motor vessel Huck Finn, are subject to the provisions of Sections 145.010 to 145.120, incl., Revised Code of St. Louis, the ordinances of the City of St. Louis imposing an earnings tax, and that the plaintiff is further subject to the provisions of the ordinance which requires it to withhold earnings taxes from the wages of said employees, Section 145.060, Revised Code of St. Louis.

BRADY, P. J., and DOWD, J., concur.

WOLFE, J., not participating.

MEMORANDUM OPINION OF TRIAL COURT

It clearly appears that under Cornell Steamboat v. United States, 321 U. S. 634 (1943), the character of the activities carried on by plaintiff company is one involving interstate commerce. On page 639 thereof that Court said: "But about ninety-five percent of the vessels towed by Cornell are picked up at New York ports and pulled to other ports in the same State. Cornell contends that none of these movements came within the Commission's jurisdiction. We accept findings of the Commission and the District Court that at least a substantial proportion of these latter movements regularly and ordinarily pass over New Jersey territorial waters. While moving on New Jersey waters, Cornell's vessels are not at that time at 'a place in New York'. Certain of its towing activities therefore actually move vessels from places in New Jersey and thence back to places in New York. Such movements, if made on land by rail carriers, would be classified as

interstate for regulatory purposes under previous decisions of this Court . . . Missouri P. R. Co. v. Stroud, 267 U. S. 404, 69 L. Ed. 683, 45 S. Ct. 243."

This Court considers the U. S. Supreme Court's interpretation of the facts in the Cornell case as one involving interstate commerce **binding** when considered in the light of the facts involved in the instant case. That legal opinions might differ on this proposition is illustrated by the dissenting opinion of Justice Frankfurter, concurred in by Justice Roberts in the Cornell case and by the dictum of the District Court in L. A. Tucker Truck Lines, Inc. v. U. S., 215 Fed. Supp. 261. It seems, however, to this Court that an activity either involves interstate commerce or it does not, irrespective of the purpose or objective behind the Court's inquiry. This Court is bound by the U. S. Supreme Court ruling in Cornell under stare decisis. So far as the word "trade", cited in USCA, Section 601, Chapter 46, is concerned it appears to be synonymous and coextensive with the word "commerce", certainly so as used and intended to be used in the cited Federal Act.

Under decided cases cited by Plaintiff in its brief and considering the broad application now being given the term "seaman" by the Courts, it is obvious that the certain defendants set out in Plaintiff's petition comes with the purview of the provisions of 46 USCA, Section 601, and was intended to be included therein and to be covered thereby.

For the reasons set forth above, and on the basis of the foregoing authorities, the judgment of this Court must be, and accordingly is, rendered in favor of the Plaintiff and against the Defendants on Plaintiff's Petition for Declaratory Judgment.

MICHAEL J. GODFREY
Judge

Dated: January 6, 1970.

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

At a Session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D. C., on the 7th day of August A. D. 1942.

NO. W-95

Streckfus Steamers, Inc. Common Carrier Application

Streckfus Steamers, Inc. having filed application under the provisions of section 309(a) of the Interstate Commerce Act for a certificate of public convenience and necessity authorizing continuance of operation as a common carrier by water, in interstate or foreign commerce; and having shown that it was in bona fide operation on January 1, 1940, in the performance of the transportation service specified below, and has continued the operation since that time; and the division so finding, therefore:

It is hereby certified, That public convenience and necessity require the continuance of operation by Streckfus Steamers, Inc., as a common carrier by self-propelled vessels, in interstate or foreign commerce, in the transportation of passengers in round-trip excursion service from all ports and points along the Mississippi, Ohio, and Illinois Rivers, returning to the port or point of origin.

It is ordered, That said carrier be, and it is hereby, authorized to perform the service specified above, subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of such authority by this Commission.

It is further ordered, That the holding of this certificate by said carrier be, and it is hereby, conditioned upon the exercise of the authority specified above, and upon compliance by said carrier with the requirements of the Inter-

state Commerce Act and the orders, rules, and regulations of the Commission thereunder.

And it is further ordered, That this certificate shall take effect and be in force from and after September 10, 1942.

By the Commission, division 4.

A true copy

W. P. BARTEL
Secretary

(Seal)

ARTICLE 1, SECTION 8, CLAUSE 3
REGULATIONS OF COMMERCE

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

ARTICLE VI

* * * * * * *

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

* * * * * * *

AMENDMENT 14

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 57,449

STRECKFUS STEAMERS, INC.,
Plaintiff-Petitioner,

CAPT. WM. F. CARROLL, CAPT. CARNELIUS RIEMER, CAPT. HARRY GRIESHABER, THOMAS P. CHAPMAN, THOMAS McKIBBEN, MARVIN CHAPMAN, ARTHUR JACKSON, GEORGE V. JOHNSON, MRS. BETTY SCHWALLER, MRS. LILY COLD, MRS. LUCY FOSTER, WILLIE COLEMAN, JOHN CARROLL, SPENCER T. JONES,
Defendants-Petitioners,

vs.

CITY OF ST. LOUIS and JOHN K. TRAVERS, Collector of the City of St. Louis,
Defendants-Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Missouri

BRIEF

In Opposition to Petition for Writ of Certiorari to Supreme Court of Missouri

Comes now the City of St. Louis, a municipal corporation of the State of Missouri, and John K. Travers, Collector of Revenue of the City of St. Louis, Missouri, the Defendant-Respondents, and respectfully make their response to the Plaintiff-Petitioner and Defendants-Petitioners' Petition for a Writ of Certiorari to the Supreme Court of the State of Missouri.

OPINIONS BELOW

This is a declaratory judgment action originally brought in the Circuit Court of the Twenty-second Judicial Circuit (St. Louis City) where Michael F. Godfrey, Judge, entered judgment for the Plaintiff (Plaintiff-Petitioner here) and employee defendants of Plaintiff (Defendants-Petitioners here). Such judgment was filed with an unreported memorandum opinion which is faithfully included in the Appendix of the **Petition for a Writ of Certiorari**, commencing at page -A-9- thereof. Appeals were duly prosecuted to the Saint Louis Court of Appeals (now by Constitutional amendment: Missouri Court of Appeals, Saint Louis District; Amendment to Article V, August 4, 1970), by the Defendant-Respondents where the trial court judgment was reversed and remanded with directions in favor of Defendant-Respondents. Such judgment with the Court's opinion is officially reported at **Streckfus Steamers Inc. v. City of St. Louis and John K. Travers, Collector of Revenue for the City of St. Louis, and Capt. Wm. F. Carroll, et al.**, No. 33787, June 15, 1971, 472 SW2d 660. Thereafter, Plaintiff-Petitioner and Defendants-Petitioners duly exhausted their procedural rights for rehearing or transfer to the Missouri Supreme Court in the Saint Louis Court of Appeals (both denied October 6, 1971), and their Application for Transfer to the Missouri Supreme Court was denied on December 13, 1971. The Missouri Supreme Court's order of denial of the Application to Transfer is not officially reported.

JURISDICTION

Defendant-Respondents urges the Court's notice of the insufficiency of the Plaintiff-Petitioner's and Defendant-Petitioner's statement of the particular basis for jurisdiction in compliance with Rule 23, 1, (b).

Here the Plaintiff-Petitioner employer cannot assert an "immunity" conferred by the terms of Section 601, 46 U.S.C.A. so as to come within the jurisdictional requirements of 28 U.S.C.A. 1257 (3). And the prior controlling decisions of this Court negate the tenuous, colorable claim of the repugnancy of the City ordinance (i.e. Section 145.-060, Revised Code of St. Louis) to the United States Statute. The Courts of the State of Missouri have not decided a Federal question of substance not heretofore determined by this Court, and have not decided any Federal questions in a way probably not in accord with applicable decisions of this Court, as would appeal to the sound judicial discretion of the Court under Rule 19.

QUESTIONS PRESENTED

I

Whether the petition is defective in that it prays for a writ of certiorari to be directed to the Missouri Supreme Court, rather than to the St. Louis Court of Appeals which rendered the opinion, and possessed of the record to be reviewed on certiorari.

II

Whether Section 601, 46 U.S.C.A. prohibits the City of St. Louis from requiring an employer to withhold an earnings tax due from the wages of its shipboard employees, where the business utilizes two river recreational excursion boats permanently based at the City which several times daily load and unload all passengers there but no other place and cruise on the Mississippi River presumably slightly threading to and fro of the imaginary boundary line at the center of the shifting channel between the States of Missouri and Illinois.

STATEMENT OF THE CASE

The case at bar presents the question of whether Streckfus Steamers, Inc. Plaintiff-Petitioner* herein, is required to withold City of St. Louis earnings taxes from the wages of all of its employees working on the Steamer Admiral and on the motor vessel Huck Finn, both excursion boats operated by Plaintiff-Petitioner on the Mississippi River several times daily from and returning to their permanent offices and docks in the City of St. Louis without stopping and without discharging either passengers or cargo at any other point (Tr. 3-5, 12).

Defendant-Respondent Collector of Revenue of the City of St. Louis demanded the withholding of City earnings taxes on November 9, 1968 (Tr. 2, 10), and Streckfus Steamers, Inc., filed a petition for declaratory judgment on July 2, 1969, requesting a resolution of the issues between the parties (Tr. 5-6). Certain individual Defendants-Petitioners, representing all classes of employees on the vessels, and the City of St. Louis and its Collector of Revenue, Defendant-Respondents, requested the judgment of the Trial Court on the issues presented (Tr. 9, 12).

Plaintiff-Petitioner Streckfus Steamers, Inc., contended that all employees on its vessels are within the description "seaman who is a member of the crew" and that consequently the collection of earnings taxes by withholding from wages is barred by the following language of Section 601, Title 46 of the United States Code Annotated (Tr. 4):

> "No part of the wages due or accruing to a master, officer, or any other seaman who is a member of the crew on a vessel engaged in the foreign, coastwise,

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* Parties are referred to by their present status, except in several instances where clarity of identity is otherwise served.

intercoastal, interstate, or noncontiguous trade shall be withheld pursuant to the provisions of the tax laws of any State, Territory, Possession, or Commonwealth, or a subdivision of any of them."

Defendant-Respondents contended that the statute is inapplicable to the facts at bar because the vessels were not engaged in "interstate trade" within the meaning of the statute (Tr. 11, 12), and further contended that none of the persons employed on board the vessels are seamen within the statutory definition (Tr. 12).

At the trial on November 17, 1969, the facts adduced were uncontroverted. The only witnesses who testified were certain individual Defendants-Petitioners, called by plaintiff, who were employed on the Steamer Admiral; namely, a captain (Tr. 13), a chief engineer (Tr. 62); a cafeteria worker serving food and cutting meat (Tr. 65); a steward (Tr. 70); a band leader (Tr. 79); a dishwasher (Tr. 81); a mate (Tr. 82); a concession stand worker (Tr. 90); and two deck hands (Tr. 76, 92).

Defendants-Respondents called no witnesses and introduced the earnings tax ordinance of the City of St. Louis, which was received in evidence without objection (Tr. 98, Defendants' Exhibit A).

The Trial Court ruled the issues in favor of the contentions of Plaintiff-Petitioner (Tr. 103-105). Defendants-Respondents' Motion for New Trial or in the Alternative to Amend the Judgment was timely filed (Tr. 105-108) and was overruled (Tr. 108). Notice of Appeal was timely filed and the appeal was duly perfected to the St. Louis Court of Appeals (Tr. 109-117).

Evidence

The principal witness was William F. Carroll, a steamboat captain who operated the Steamer Admiral on excursion trips on the Mississippi River from its offices and

dock at the foot of Washington Avenue in the City of St. Louis from mid-May to mid-September of each year (Tr. 13-14). The Admiral makes day and night excursions in the course of which it crosses the mid-channel of the river back and forth and it returns to the City of St. Louis at the end of each trip (Tr. 15-16). As an excursion vessel the Admiral carries no passengers from point to point and carries no freight from point to point. It makes no trips from the City of St. Louis as a port to any other port up or down the Mississippi River (Tr. 18).

Captain Carroll testified that the Huck Finn is also an excursion vessel used for one hour narrated sight-seeing trips during the day from the City of St. Louis, returning to the City of St. Louis without a stop. In evenings, the Huck Finn is available exclusively for charter excursion rides no longer than four hours and the vessel returns to the City of St. Louis at the end of each charter. The Huck Finn, like the Admiral, meanders across the thread line of the river (Tr. 19-22).

Captain Carroll testified that the Steamer Admiral was not in the ferry service across the river and in no way carried passengers or cargo to any port of call (Tr. 35-36). He stated that only the Delta Queen (not involved in tax withholding) presently transports passengers from port to port on excursions and that Plaintiff-Petitioner Streckfus Steamers, Inc., started in that business but now operates only local excursion vessels (Tr. 60-61).

The average number of passengers carried by the Steamer Admiral day and night ranges between 1,800 and 2,000 per trip (Tr. 52-53), and it makes two trips per day. It carries 200-225 employees, depending on the number of waiters carried, and the categories of employees include bartenders, musicians, deck hands, cooks, porters, powder-room maids, bus-boys, and concession help (Tr. 16). The Admiral is designed to serve large numbers of

people and has facilities to feed as many as 4,000 persons in one evening. The facilities include a snack bar, cafeteria service, and "bring your own" food facilities. There are several food service locations, one on the first deck and three on the fourth deck; soft drinks, beer and hard liquor are served (Tr. 22-24). Captain Carroll stated that the passengers occupy their time by self-amusement: eating, drinking, conversation, card playing, and by dancing to the music of a band which plays during both day and evening trips. The boat also provides the facilities of two gift shops, a card vending machine, a standard metal machine, miniature pony and space-ship rides for children, arcade type machines, and pinball and photograph devices (Tr. 25-27).

On the question of personnel employed on board, Captain Carroll testified that it would take approximately twenty persons to operate the Steamer Admiral without passengers, including a captain, mate, pilot, one or two engineers, strikers, water tenders, firemen, and deck hands (Tr. 37-38), and that of such persons only the captain, mate, pilot, and engineers were licensed by the United States Coast Guard (Tr. 40).

The total complement of employed personnel on board the Admiral were stated to be two roof watchmen; five or six bus boys on the fourth deck; five people in the dish room; six in the cafeteria serving line; five in the kitchen; two in the fourth deck snack bar; ten bus boy-porters on the cabin deck; steward and assistant steward; two deck supervisors; four powder-room maids; three people in the concession stands; two people in the bar; sixteen persons employed as cashiers, concession help, and porters on the first floor; six or seven persons in the engine room; eight to ten deck hands, a mate; waiters varying to as many as fifty on a given trip; eighteen cleaning women who clean only when the boat is tied up at the wharf; and an average of ten members of the orchestra (Tr. 46-50).

Except for the twenty persons required to navigate the vessel (Tr. 37-38), none of the other employed personnel had any duty pertaining to navigation. All employed personnel, however, were assigned emergency stations and engage in weekly drills of 20 to 25 minutes duration (Tr. 16-17, 52), while moored at the dock.

Captain Carroll testified that his duty hours on the Steamer Admiral were from 8:30 a.m. to 3 p.m. and that during that said period he spent from one to one and a half hours before the vessel left the dock, and spent the rest of his duty time during the trip on the river (Tr. 34). He testified that the turning point in the river on excursion trips depended on conditions and was indefinite (Tr. 57-59).

Witness Thomas P. Chapman, Chief Engineer, stated that he supervised four firemen, two water tenders, two strikers, two air-conditioning men, and one or two other engineers (Tr. 62-63).

Witness Lucy Mae Foster, a cafeteria worker, testified that the weekly emergency drills were performed on board after the Steamer Admiral docked in the afternoon or sometimes after night trips (Tr. 66-67). Witness Felix M. Chapman, the steward, confirmed the fact that the drills did not occur during a cruise (Tr. 73). He stated that no emergency had occurred during a cruise during the 19 years of his employment (Tr. 74-75).

Witness Cornelius John Riemer, a mate on the Admiral, testified that the average number of employed personnel per trip was about 140 persons, including approximately fifty waiters, divided into the following categories: waiters, roof watchmen, bus boys, cafeteria servers, kitchen help, soda fountain employees, snack bar employees, supply boys, stock boy for soda and beer, dishwashers, steward, assistant steward, dock supervisors, powder-room maids, concession workers, bartenders, porters, engine

room personnel, deck hands, purser's office employees, captain's office personnel, and cashiers (Tr. 85-90).

The earnings tax ordinance of the City of St. Louis, "Defendants' Exhibit A," imposes a one per cent tax on the wages of all employees subject to the tax who are residents of the City of St. Louis, and on that portion of the earnings of non-residents of the City of St. Louis attributable to services performed as a result of employment within the City. No question is raised herein to the applicability of the tax to any of the employees of Plaintiff-Petitioner, except for the issue of the applicability of Section 601, Title 46 of the United States Code Annotated as heretofore quoted (Tr. 4).

ARGUMENT

Whether the Petition Is Defective in That It Prays for a Writ of Certiorari to Be Directed to the Missouri Supreme Court, Rather Than to the St. Louis Court of Appeals Which Rendered the Opinion, and Possessed of the Record to Be Reviewed on Certiorari.

Here the Plaintiff and Defendant-Petitioners seek to have his Court direct a writ of certiorari to a court which has formerly declined to receive and pass judgment in the matter. As appears from the **Petition for a Writ of Certiorari**, at the caption of the pleading, page 1 "To the Supreme Court of Missouri", and at page 2 (**Petition**), "Opinion Below", a writ is sought to be directed to the Missouri Supreme Court. As it further appears from several sources in the **Petition** (i.e. p. 1, p. 2, "Jurisdiction", p. 3, "Questions Presented", and p. 27, "Conclusion", *inter alia*), the Petitioners in fact assert federal infirmities in the judgment and opinion of the St. Louis Court of Appeals and not a judgment or opinion of the Missouri Supreme Court. The Petitioners, precisely, ask this Court "* * * that a Writ of Certiorari issue to review the opinion of the St. Louis Court of Appeals * * *" (**Petition**, pgs. 1 and 2).

The notice of the Court is solicited to the fact that the **Petition** (p. 2) accurately states that the Missouri Supreme Court refused to transfer this cause from the St. Louis Court of Appeals (see Appendix A-1). The Missouri Supreme Court did not write an opinion but simply denied the Petitioners' Application for Transfer. This is not an affirmance of the judgment or adoption of the opinion of the St. Louis Court of Appeals and cannot be considered an expression of opinion on the merits of the case. Under the Constitution of Missouri at Article V, Section 4, the Missouri Supreme Court, in applications for transfer exer-

cises only superintending control over the St. Louis Court of Appeals which is exercised in a formal manner according to a limited set of decisional circumstances. Rule 84.05 (b) of the Missouri Supreme Court (Revised Statutes of Missouri, 1969, Vol. 5) is referrable to the Court's constitutional superintending power and set out the limited circumstances which must appear in order for the Court to consider an exercise of its jurisdiction in such regard. Where the court elects to exercise its jurisdiction, Rule 84.05 (b) operates to lodge the case in the Missouri Supreme Court for judgment. This, of course, did not occur here.

While the application to the Missouri Supreme Court was necessary in order for the St. Louis Court of Appeals to become the final, highest court of the State in which a decision could be had in accordance with the dictates of 28 U.S.C. 1257 (on refusal of the Missouri Supreme Court to exercise jurisdiction), this is not to say that the judgment and opinion of the Court of Appeals then becomes the judgment and opinion of the Supreme Court, and therefore a writ of certiorari, in order to reach the record of the deciding court ought to go to the Supreme Court. To the contrary, under Missouri law the transcript in the cause remained in the St. Louis Court of Appeals (where no order of transfer occurs as here) according to the Missouri Constitution, Article V, Section 10, and Missouri Supreme Court Rule 84.05.

Further, the transcript contains the whole record (i.e. pleading, proceedings, evidence, orders, and judgments, Rule 84.12 (b)) necessary to a determination of all questions before the appellate court (i.e. St. Louis Court of Appeals). The transcript of the record was never before the Missouri Supreme Court and is not now in such court. Consequently, certiorari to the Missouri Supreme Court would not function to bring the judgment and opinion Petitioners wish to be reviewed to this Court.

This point is elementary and has been so treated by the Court in its past handling of such factual circumstances. In **Williams v. Florida**, 399 U.S. 79, 90 S. Ct. 1893, 26 L. Ed2d 446, the writ was directed to a lower Florida appellate court and that lower court's judgment was affirmed. The Court made clear the reason for its action by the explanatory footnote No. 5, to the opinion (l.c. L.Ed2d 449). Earlier, in **Western Union Telegraph Co. v. Priester**, 276 U.S. 252, 48 S. Ct. 234, 72 L.Ed 55, the Court illucidated the rule for its dismissal stating:

> "But as the supreme court of Alabama, by denying the petition for certiorari, on the face of the record did not pass on the merits, the writ of this court in No. 183 was properly directed to the court of appeals, and that in No. 189 is dismissed."

The proper action indicated by the status of the case as it presently exists before this Court appears to be an entry of an order denying the petition for certiorari because of lack of jurisdiction.

II. Whether Section 601, 46 U.S.C.A. Prohibits the City of St. Louis From Requiring an Employer to Withhold an Earnings Tax Due From the Wages of Its Shipboard Employees, Where the Business Utilizes Two River Recreational Excursion Boats Permanently Based at the City Which Several Times Daily Load and Unload All Passengers There But No Other Place and Cruise on the Mississippi River Presumably Slightly Threading to and Fro of the Imaginary Boundary Line at the Center of the Shifting Channel Between the States of Missouri and Illinois.

In their Petition, Petitioners urge upon the Court a view which avoids all reasonable consideration of the intent or purpose of Congress in enacting Section 601, 46 U.S.C.

(pertinent part). The Petitioners attempt to force their self-assumed meaning of the statute through a blind application of a talismanic test never adopted by this Court and very pointedly rejected by it. Misunderstanding of the pronouncements of this Court have led to the Plaintiff's misreading and incomprehension of the judgment and opinion of the St. Louis Court of Appeals. The test the Plaintiffs would have this Court apply involves a simple geographic determination of whether their navagational operations on the Mississippi River "thread" the center of main channel so as to technically enter the Illinois side. They urge such a test regardless of its strained, academic character, or its lack of any real consequence upon the flow of commerce and without any real consideration given to the settled, historic treatment of interstate commerce by Congress and this Court.

Respondents suggest that the Petitioners' approach really presents no matter worthy of the interest of this Court. As we will endeavor to make clear following, this Court has made abundantly plain and has left no room for serious question that the regulation of interstate commerce is a delicate matter, grounded in common sense and highly respective of practicality. We respectfully submit that the St. Louis Court of Appeals has been solicitously faithful to the true and controlling teachings of this Court, and the question raised by the Petitioners is the product of their failure to intelligently apply such teachings.

While a survey of the cases provides background and enlightenment for accurate perception of the controlling rule in this case, Respondents believe that the opinion by Mr. Justice Frankfurter in **Central Greyhound Lines v. Mealey**, 334 U.S. 653, 68 S. Ct. 1260, 92 L.Ed. 1633, is the latest, most instructive and authoritative pronouncements by the Court and unmistakably decisive of

the questions raised in this case. There the Court expounded upon and clarified the holdings in **Lehigh Valley R. Co. v. Pennsylvania**, 145 U.S. 192, 12 S. Ct. 806, 36 L.Ed. 672.

The Court will recall that in the **Central Greyhound Lines v. Mealey** (i.e. Central Greyhound) the company contended first that it was not subject to a tax imposed on its operations by the State of New York. The New York Tax Commission had decided that the State's franchise tax, measured by gross receipts derived from transportation between points within the State but over routes that utilized the highways of Pennsylvania and New Jersey, was applicable to all the receipts. Forty-three percent (43%) of the operations were outside of New York State. The basis of this claim was, like here, that since the transportation crossed state lines it was interstate commerce and therefore New York could not constitutionally tax such gross receipts. (A secondary claim urged that if taxation was not unconstitutional, New York could only tax so much of the gross receipts as were attributable to the mileage covered in New York.)

In deciding that not every burden on interstate commerce is unconstitutional this Court went to great pains to illucidate the precepts governing the Federal-States relationship and the State-to-State implications.

In cogent language the Court established the context of inquiries as to whether a specific action of a state offends the Commerce Clause or a particular exercise of power of Congress under the Clause. As Mr. Justice Frankfurter phrased it (92 L.Ed. 1637):

> This case serves to remind once more that courts do not adjudicate abstractions, such as "What is interstate commerce?" Also, it again illustrates that even if it be found that certain transactions in fact constitute interstate commerce, such conclusion does

not answer the further inquiry whether a particular assertion of power by a State over such transactions offends the Commerce Clause.

The Court pointed out that determinations as to whether a State's exercise of power is proper or not, must depend upon something more substantial and objectively important than the geographic fact that state lines are crossed. The observations of the Court are worth recalling. In objecting to the erroneousness of the "language" of some prior decisions which, while actually taking into account the practicalities of the considered situations, spoke in such a way as to disregard the fact of the existence of interstate commerce, where in truth it existed but was of such a minor character as to be inconsequential as compared to the overwhelming domestic, state character. The Court adopting its prior consistent teachings: (92 L.Ed. 1639)

> * * * Regulation and commerce among the States both are practical rather than technical conceptions, and, naturally, their limits must be fixed by practical lines, Galveston, H & S.A.R. Co. v. Texas, 210 US 217, 225, 52 L. Ed. 1031, 1036, 28 S. Ct. 638. But to label transportation across an interstate stream "local commerce" for some purposes when it is "interstate commerce" in other relations, see, e.g. Covington & C Bridge Co. v. Kentucky, 154 US 204, 38 L Ed 962, 14 S. Ct. 1087, 4 Inters Com 649, is to use loosely terms having connotations of constitutional significance. To call commerce in fact interstate "local commerce" because under a given set of circumstances, as in the Lehigh Valley Case, a particular exertion of state power is not rendered invalid by the Commerce Clause is to indulge in a fiction. * * *

Again to make its holding so clear that future confusion would not likely reoccur the Court repeated: (92 L.Ed. 1640)

> • • • The kind of confusion to which the Lehigh Valley opinion has given rise results from employing a needless fiction—calling commerce local which in fact is interstate—as a matter of stating that a particular exercise of State power is not invalid even though it affects interstate commerce. The difficult task of determining whether a phase of commerce, concededly interstate, is subject to a particular incidence of State regulation, through taxation or otherwise, is not lessened by calling interstate commerce local commerce in order to sustain its local control. To state this persistent and protean problem of our federalism in the form of a question—begging fiction, is not to answer it. • • •

With the destruction of any automatic decisional significance for the phase "interstate commerce" the Court then addressed the real or controlling aspects of resolving the sometimes thorny question of substantial burden on interstate commerce.

The Court isolated a number of factors as important to resolution of such questions, a fair understanding of the Court's meaning instructs that such isolated matters are not intended to be exhaustive but sharply illustrative. These factors included circumstances such as: The reasonable benefits another State confers upon the transportation while within its borders; the trifling in quantity proportion of transactions within the other State's territory; and whether the State's exaction is constitutionally a fair demand where such state has a special relation in the transaction. (See: 92 L.Ed. 1640.) Supportive of the continuity of Central Greyhound with prior decisions actually relying on such reasonable considerations, even while colorably relying on the impermissibly inadequate "interstate commerce" test, the Court cited the existence of these factors in prior cases. (See: 92 L.Ed. 1640-1641.)

Here, while it is true that the reach of a statute (46 U.S.C.A. Sec. 601) rather than a constitutional test of the statute is involved, still the power exercised by Congress in this area is referrable to the Commerce Clause and the specific intent of Congress is to be properly settled by imputing an object or purpose to further proper regulation and control within the meaning of the Commerce Clause. This is to say, Congress does not operate in a vacuum without regard for its past clearly discernable plan and the settled constructions placed upon its acts by this Court. (**New York ex rel. Cornell Steamboat Co. v. Sohmer**, 235 U.S. 549, 35 S. Ct. 162, 59 L.Ed. 335; **United States v. Chandler-Dunbar Water Power Co.**, 209 U.S. 447, 28 S. Ct. 579, 52 L.Ed. 881.)

Applying these principles to the case at hand it is urged that Section 601, 46 U.S.C. must be considered from the standpoint of Congress' legitimate interest in regulating interstate commerce and the exercise of State powers in relation thereto so as to promote and maintain the free flow and intercourse which is the object of the Commerce Clause.

Initially, as the St. Louis Court of Appeals recognized and expressly documented, the immediate purpose of Congress in enacting Section 501, 46 U.S.C.—amendment thereto—was "* * * to prevent multiple withholdings from the wages of seamen who might be in ports of different states when they received their pay. * * *" (See: **Streckfus Steamers, Inc. v. City of St. Louis**, 472 SW2d 660, l.c. 663). Further, as the St. Louis Court of Appeals cites (same l.c. supra), the substantiation of this Congressional intent is recorded at **2 U.S. Code, Congressional and Administrative News, 86th Congress—First Session** 1959, pp. 2530-2536.

Therefore, proper evaluation of the exercise of the power asserted by the City of St. Louis necessarily in-

volves the discovery of whether the vice protected against by the Statute (i.e. 46 U.S.C. 601) is induced or worked by the City's act. The Plaintiffs' "interstate commerce" automatic test sweeps with too all-inclusive dimensions and totally negates that refined accommodation with the legitimate interests of the States that Congress has always carefully respected.

Here, the travel across the State boundary of Illinois is first a presumptive crossing, and occurs simply because the two States' boundaries are defined by the center-line of the main navigation channel. This channel continually shifts with the vagarities of the river flow and obstructions. As before discussed, to make such a factor decisive is to ignore the insistence of this Court upon rationality. There is no aspect of the Plaintiff-Petitioner's business intentionally directed to travel in Illinois.

Further, the base of operations is located within the City of St. Louis. The Company offices, its administration and the control of all its operations are situated in and directed from St. Louis. The nature of its business involves "transportation" only in a limited sense; passengers do not partake of its facilities to be transported from one place to another interstate or intrastate. The vessels are simply the type of "excursion boats" common to metropolitan areas near navigable waters devoted to shipboard picnics and relaxation. The patrons are aboard for a relatively short time (a matter of hours) and such excursion rides are repeated several times daily. The employees too, have a distinct and substantial relationship to the City of St. Louis. They daily report for work to the site of the Company offices in St. Louis (where both vessels are moored). At the conclusion of their working hours they depart from the same location within the City. The vessels of the Company never stop at another port

at any time in the course of their repeated daily excursions. No goods are carried; no passengers are either taken on or discharged other than at the office and mooring location within St. Louis. The City of St. Louis is the only authority which renders fire, police, water and other such services and facilities to the Company, its properties and its employees. By their own admission, the Petitioners establish that in the long history of their operations no other state authority has attempted to exercise any tax collecting system other than Missouri and the City of St. Louis.

As the St. Louis Court of Appeals pointed out (472 S.W.2d l.c. 663), these circumstances do not give rise to any imposition or harassment of seamen. There is no rational possibility, under the unique lack of any relationship to any other State or even local authority outside of the City of St. Louis, within Missouri that other or additional withholdings will occur. Certainly the long so unencumbered history of the Petitioner's operations decisively demonstrate this. The most reasonable and efficient means of collecting the earnings tax owed by the employees of the Company, is withholding at the accounting offices of the place of employment. (There exists no question that such tax is owing.)

These incidents of the circumstances surrounding the Petitioners' operations and employment are urged as clearly demonstrating the *de minimis* relationship to interstate commerce and the total absence of any substantial burden on such commerce. And as before said, there is abundant support for the conclusion that, under the unique circumstances of the case, withholding at the sole and only place of payment of wages is a reasonable and effective procedure, fair and unburdensome for both the employee and the employer, and a viable means of distributing the cost of government equally.

Objectivity is truly subverted by a contention that Congress intended to exercise its power to thwart the fair, reasonable and unburdensome means used here. Respective of employees burden, one has but to consider the alternative to the employee, namely, making minute periodic payments directly to the City himself, to comprehend the interest of the employee. No sensible construction of Section 601, 46 U.S.C.A. supports working such a result.

The Petitioners attempt to create a problem where none exists through their outside the record assertions regarding the widely adverse implications of permitting the Court of Appeals decision to stand. However, the whole history of the Petitioners' operations and the total absence of any real proof belie such "boot-strap" argument. (See **Petition**: pgs. 14, 21, 23 and 25-27). The plain fact is that no other jurisdiction has construed its laws to require withholding from the Company employees' wages. The whole of the argument respecting the State of Illinois, flies in the face of the facts and is so speculative as to merit no serious consideration. There is simply no truth to the assertion that "many carriers which operate on the Mississippi River" will be "affected" by the St. Louis Court of Appeals decision. In fact it is hardly conceivable that any besides the Petitioners could be affected because of the unique nature of this case. Should there be others so situated at other locations of parallel circumstances, a like result would be also just.

Petitioners attempt to attack the St. Louis Court of Appeals decision through the device of attributing to that Court a crucial reliance on **People of the State of New York ex rel. Cornell Steamboat Company v. Sohmer**, 235 US 549, 35 S.Ct. 162, 59 L.Ed. 355. After such misplaced attribution the Petitioners then attempt to negate such constructed authority.

A careful and fair analysis of the Court of Appeals opinion demonstrates that the Court construed Section 601, 46 U.S.C.A. in the light of the documented intent of Congress and the teachings of this Court.

As before discussed at some length, this Court has illucidated its prior decisions clearly instructing that such term "interstate commerce" is not a magic touchstone that automatically solves interstate commerce relationships and that the substantial practical considerations must be carefully considered. This is precisely the course of the Court of Appeals. The first **Cornell** case (supra) was discussed as was the case cited by the Petitioners, **Cornell Steamboat Co. v. United States**, 321 U.S. 634, 64 S.Ct. 768, 88 L.Ed. 978, solely to illustrate the proper perspective in viewing the relationship of factual circumstances to interstate commerce. As before pointed out, this Court has approved such approach, even though critical of some of the expressions utilized in reaching the result. (**Central Greyhound Lines, Inc. v. Mealey**, (cite supra); **United States v. Yellow Cab Co.**, 332 U.S. 218, 67 S.Ct. 1560, 91 L.Ed. 2010.) More to the point, the Petitioners' criticism results from a misapprehension of the basis of decision of the St. Louis Court of Appeals.

CONCLUSION

Defendant-Respondents respectfully pray this Honorable Court to deny Plaintiff and Defendant Petitioners' Petition for a writ of certiorari; such Petition seeks to review a court which is not possessed of the record and therefore the Petition ought to be dismissed; and the claims of the Petitioners are opposed to the settled principles of law which were faithfully applied by the St. Louis Court of Appeals in its judgment and opinion.

Respectfully submitted

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Supreme Court, U. S.
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71-1168

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. .....

STRECKFUS STEAMERS, INC.,
Plaintiff-Petitioner,

CAPT. WM. F. CARROLL, CAPT. CORNELIUS RIEMER, CAPT. HARRY GRIESHABER, THOMAS P. CHAPMAN, THOMAS McKIBBEN, MARVIN CHAPMAN, ARTHUR JACKSON, GEORGE V. JOHNSON, MRS. BETTY SCHWALLER, MRS. LILY COLD, MRS. LUCY FOSTER, WILLIE COLEMAN, JOHN CARROLL, SPENCER T. JONES,
Defendants-Petitioners,

vs.

CITY OF ST. LOUIS and JOHN K. TRAVERS, Collector of the City of St. Louis,
Defendant-Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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To the Supreme Court of Missouri:

The only new question which the attorneys for Defendants-Respondents raise in their Brief in Opposition to Plaintiff-Petitioner and Defendants-Petitioners' Petition for Writ of Certiorari herein is whether or not the Peti-

tion is Defective in that it Prays for a Writ of Certiorari to be Directed to the Missouri Supreme Court rather than the St. Louis Court of Appeals which Rendered the Opinion and Possesses of the Record to be Reviewed on Certiorari hence this Petition should be dismissed.

The argument runs that since the Missouri Supreme Court did not render an opinion in this case, but simply denied petitioners' application for transfer, this did not represent a judgment or the adoption of the opinion of the Court of Appeals, and therefore, the action of the Supreme Court of Missouri cannot be considered an expression of opinion on the merits of the case. Whether defendants-respondents are right or wrong that the transcript of the record is now before the St. Louis Court of Appeals and not the Supreme Court of Missouri is unimportant to the jurisdiction of this Court. As long as defendants-respondents admit, as they do, that the Writ was timely applied, defendants-respondents rely upon the case of **Western Union Telegraph Co. v. Priester**, 276 U.S. 252, 48 S. Ct. 234, 72 L.Ed. 55, for the position that this Petition should be dismissed. In that case, however, out of super abundance of caution, the Petitioners filed two Petitions, one directed to the Supreme Court of Alabama and the other to the Alabama Court of Appeals. Since the court determined that the one that had the record was the Alabama Court of Appeals, it obviously and correctly dismissed the other Petition to the Alabama Supreme Court as stated by this Court at page 258:

> "Through abundance of caution petition filed separate petitions here, which were granted, asking that writs of certiorari be directed respectively to the Court of Appeals and to the Supreme Court. But as the Supreme Court of Alabama, by denying the petition for certiorari, on the face of the record did not pass on the merits, the writ of this Court in number

183 was properly directed to the Court of Appeals, and that in number 189 is dismissed. Norfolk Turnpike Co. v. Virginia, 225 U. S. 264, 269; Western Union Telegraph Co. v. Crovo, 220 U. S. 364; compare Matthews v. Huwe, 269 U. S. 262."

The City seems to think that if a Petitioner asks for the Writ to be directed to a Court which does not hold the records of the proceeding that this Court loses the jurisdiction to issue a Writ. Such is not the case. As early as 1875 (and well before the modern conception of liberality of amendment to conform to rules so as to achieve justice became the lode star of this and other Federal Courts) this court in **Atherton et al. v. Fowler et al.**, 91 U. S. 134, had the following to say at page 146:

"**The citation goes to the parties, and brings them before us.** The writ of error, therefore, is properly 'directed to the court which holds the proceedings as part of its own records, and exercises judicial power over them.' Hunt v. Palas, 4 How. 590. If the highest court of the State retains the record, the writ should go there, as that court can best certify to us the proceedings upon which it has acted and given judgment. As it is the judgment of the highest court that we are to re-examine, we should, if we can, deal directly with that court, and through it, if necessary, upon the inferior tribunals. **It is, perhaps, safe to say that a writ will never be dismissed for want of jurisdiction, because it is directed to the highest court in which a decision was and could be had.** We may not be able in all cases to reach the record by such a writ, and may be compelled to send out another to a different court before our object can be accomplished; but that is no ground for dismissal. We have the right to send there to see if we can obtain what we want." [Emphasis added.]

In **Department of Banking v. Pink**, 317 U. S. 264 this Court again had the procedural question to decide as to which court its Writ should run. At page 267 this court said:

> "It is true that our writ to review a judgment of the highest court of a state may properly run to a lower court where the record is physically lodged, and where under New York practice a judgment is entered upon the remittitur of the Court of Appeals. It is nevertheless immaterial whether the record physically lodged in the one court or the other, since we have ample power to obtain it from either. Atherton v. Fowler, 91 U. S. 143, 146."

We might add that in this case the question of timelessness was not drawn into question. Assuming the respondent is correct, then probably if a Writ is issued in this case, it should issue to the St. Louis Court of Appeals rather than the Supreme Court. Jurisdiction of this Court to issue a Writ for Certiorari, once the Petition is filed, is not lost if the Writ prays for the issuance to a Court where the record is not lodged for then this Court can direct it to whatever court has the record as long as it is the final judgment of the highest court of the State which has this jurisdiction.

The prayer of the Petition in this case at page 27 specifically states that the **decision of the St. Louis Court of Appeals** decides the question of substance and in a way not in accord with the applicable decisions of this court. It also states that a decision which we claim is wrong as rendered **by the St. Louis Court of Appeals** is a matter of great importance to many carriers not only on the Mississippi but on the Ohio and probably Columbia Rivers. **It is a question which this Supreme Court should finally settle rather than the St. Louis Court of Appeals.**

It is the opinion of the St. Louis Court of Appeals that is challenged and that is clear throughout the Petition. Defendants Petitioners admit it is the final decision of the highest court of the state in this instance. Where the record is lodged is therefore only important in determining to which court the writ should run but that is not jurisdictional.

2. The remainder of respondents' brief contains nothing to bolster the obviously erroneous opinion of the St. Louis Court of Appeals and no new cases are contained therein not already in the opinion. Consequently, it requires no reply.

Respectfully submitted

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